Regional Home Care, Inc., d/b/a North Atlantic Medical Services *and* Truck Drivers Union Local No. 170, a/w International Brotherhood of Teamsters, AFL–CIO. Cases 1–CA–32995 (1–2), 1–CA–33248, 1–CA–33299, 1–CA–33476, 1–CA–33623, and 1–RC–20292

September 9, 1999

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On March 17, 1998, Administrative Law Judge Judith Ann Dowd issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs. The Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order[4] as modified and set forth in full below.[5]

Contrary to our dissenting colleague, we agree with the judge that the Respondent violated Section 8(a)(3) of the Act when it removed Gary Roy from light duty work and then discharged him, and laid off Marc Kirouac.

At the request of field service technician (driver) Marco Nagle, Union Organizer Al Stearns met with five employees at the union hall on April 6, 1995.[6] All five signed authorization cards that evening. Nagle subsequently obtained three more signed cards. By the April 13 meeting at the union hall, 8 of approximately 11 unit members had signed cards. Stearns filed a representation petition with the Board, which sent a copy of the petition to the Respondent on April 17. Stearns met with the Respondent's employees six more times before the June 1 election.

On April 20, 3 days after the petition was filed, the Respondent removed employee Gary Roy from the light duty assignment it had given him 4 months earlier after an injury. On April 21, the Respondent transferred Michael McDermott from a sales position back into the unit as a field service technician. On May 22, the Respondent discharged Roy and laid off Marc Kirouac. Prior to the election, the Respondent's president, Cabot Carabott, held two mandatory employee meetings and distributed two memoranda to employees in which the Respondent threatened employees with discharge, loss of jobs, closing of operations, and other reprisals if they supported a union, questioned employees about their union activities, solicited grievances, and implicitly promised to remedy them, and told employees it was futile to support a union.

The judge found, we agree, and our dissenting colleague does not dispute, that the Respondent transferred Michael McDermott into the unit in an attempt, "for discriminatory reasons, to pack the election unit in order to dilute the Union's strength." Contrary to our dissenting colleague, we also agree with the judge's finding that the Respondent's actions against union supporters Roy and Kirouac were part of this "scheme to dilute the pro-union vote." In finding these "ousters" discriminatory, the judge relied on their timing, the pretextual explanations for the Respondent's treatment of Roy and Kirouac, and the antiunion animus shown both by the unlawful transfer of McDermott into the unit and by President Carabott's unlawful speeches and statements.

The judge rejected the Respondent's claim that it did not know that Roy and Kirouac were union supporters. Our dissenting colleague would find that the General Counsel has failed to show that the Respondent knew or had reason to believe that either employee was a union supporter. For the reasons set forth below, we do not agree.

It is well established that the "knowledge" element of a violation of Section 8(a)(3) need not be established by direct evidence, but "may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn." *Montgomery Ward & Co*., 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996). We may infer knowledge based on such circumstantial evidence as the timing of the alleged discriminatory actions; the Respondent's general knowledge of its employees' union activities; the Respondent's animus against the Union; and the pretextual reasons given for the adverse personnel actions. *Montgomery Ward*, supra; *BMD*

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions have been filed to the judge's finding that Steven Custer is a supervisor.

[3] In finding that statements made by Cabot Carabott, the Respondent's president, violate Sec. 8(a)(1), we find it unnecessary to rely on the judge's citation to *Baddour, Inc.,* 303 NLRB 275 (1991).

[4] Our dissenting colleague would not grant a bargaining order under *NLRB v. Gissel Packing Co.,* 395 U.S. 595 (1969), at this time, but would reserve judgment on the bargaining order until after the election results in the representation case are known. Contrary to our dissenting colleague, we see no reason to delay the issuance of a bargaining order because, as set forth in the majority opinion in *General Fabrications Corp.*, 328 NLRB No. 166 fn. 17 (1999), it is well settled that a union is entitled to both a bargaining order and a certification of representative in the event the revised tally of ballots shows that it won the election.

[5] The judge found that the Respondent unlawfully increased the size of its work force in order to dilute its employees' support for the Union. The judge, however, failed to include a remedy for this finding in her recommended Order and notice. We shall correct this inadvertent error.

[6] All subsequent dates are in 1995 unless otherwise indicated.

Sportswear Corp., 283 NLRB 142, 143 (1987), enfd. 847 F.2d 835 (2d Cir. 1988). For the following reasons, we agree with the judge's inference that the Respondent knew or suspected that Roy and Kirouac were union supporters.

First, there can be no question that the Respondent had general knowledge of its employees' union activity based on the representation petition it received from the Board on April 17.

Second, the unlawful transfer of McDermott into the unit and the unlawful statements made by Carabott show the Respondent's strong animus against the Union and its willingness to manipulate the bargaining unit as part of its campaign to defeat the Union.

Third, the Respondent's actions against Roy commenced 3 days after the filing of the election petition when it removed him from light duty. One day later, the Respondent unlawfully transferred McDermott into the unit in order to dilute the Union's strength. A month later and shortly before the election, the Respondent discharged Roy and laid off Kirouac. The timing of these actions is, as one court has phrased it, "stunningly obvious." *NLRB v. Novelty Products Co*., 424 F.2d 748, 750 (2d Cir. 1970).

Finally, the judge found, with ample record support, that the Respondent's explanations for its treatment of Roy and Kirouac were pretextual. Most significantly, the judge discredited the witness who testified that the adverse actions were taken for nondiscriminatory reasons, and there is no basis for reversing the judge's credibility findings. See footnote 2, supra. Our dissenting colleague would, however, find that the Respondent's proffered nondiscriminatory reasons were legitimate. Given the judge's credibility-based finding that the Respondent's asserted reasons were not its actual ones, the legitimacy of those reasons is irrelevant. Having "evaluated the [Respondent's] explanation[s] for its action[s] and concluded that the reasons advanced . . . were pretextual," the judge's "findings and conclusions fully satisfy the analytical objectives of *Wright Line*." *Limestone Apparel Co.*, 255 NLRB 722 (1981) (referring to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)). Our colleague also opines that the judge's rejection of those reasons was speculative and constituted a substitution of her judgment for that of the Respondent. This criticism mischaracterizes the judge's decision, which carefully analyzed the record to determine the Respondent's real motivation for its conduct.[7] "While it is a truism that management makes management decisions, not the Board . . . it remains the Board's role, subject to our deferential review, to determine whether management's proffered reasons were its actual ones." *Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998).

In sum, we believe that the totality of circumstances—i.e., the Respondent's general knowledge of its employees' union activity, its pretextual reasons for removing Roy from light duty work, discharging him, and laying off Kirouac, its demonstrated antiunion animus, including its unlawful attempt to pack the unit, and the timing of the actions against Roy and Kirouac in relation to the filing of the petition, the unlawful transfer of McDermott, and the Board election—warrant inferring that the Respondent knew or suspected that they were Union supporters.[8] Accordingly, we find no merit in our dissenting colleague's position,[9] and we adopt the judge's decision finding that the Respondent violated the Act by its discriminatory actions against Roy and Kirouac.

ORDER

The National Labor Relations Board orders that the Respondent, Regional Home Care, Inc., d/b/a North Atlantic Medical Services, Leominster, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting grievances from employees and implicitly promising to resolve them without a union.

(b) Threatening employees with discharge, loss of jobs, closing of operations, and other reprisals for supporting a union.

(c) Telling employees it would be futile to support a union and questioning them about their union activities.

(d) Discriminating against employees by transferring, discharging, laying off, or otherwise discriminating against them because they or other employees engaged in union activities or testified in Board proceedings.

(e) Increasing its work force in order to dilute support among its employees for Truck Drivers Union Local No. 170, a/w International Brotherhood of Teamsters, AFL–CIO, or any other union.

(f) Making unilateral changes in wages, hours, and other terms and working conditions of unit employees without first notifying the Union and giving it the opportunity to bargain over those changes.

[7] Our dissenting colleague accuses the judge of engaging in "subjective speculation." However, he is apparently willing to conclude, based on nothing more than pure conjecture, that the Respondent was not attempting to strip Kirouac of his eligibility to vote. In fact, the record shows, and the judge found that, consistent with the General Counsel's theory of the case, the Respondent omitted Kirouac's name from its list of eligible voters.

[8] In light of the substantial record evidence, summarized above, supporting the judge's inference of knowledge, we find it unnecessary to rely on the small plant doctrine.

[9] Our dissenting colleague asserts that the judge has "bootstrapped" proof of knowledge from proof of other elements showing antiunion motivation. The Board, however, has held that "[t]he same set of circumstances may be relied on to support both an inference of knowledge and an inference of discrimination." *Coca-Cola Bottling Co. of Miami*, 237 NLRB 936, 944 (1978). See also *Abbey's Transportation Services,* 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988).

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively and in good faith with the Union as the exclusive bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement:

> All regular full-time and part-time field service equipment technicians (drivers), equipment repairmen, warehousemen, delivery men and dispatchers, employed by the Respondent at its Leominster, Massachusetts facility, but excluding all other employees, office clerical employees, professional employees, managerial employees, confidential employees, guards, and supervisors as defined in the Act.

(b) Within 14 days from the date of this Order, transfer Michael McDermott to his former or a substantially equivalent position, and offer Gary Roy, Marc Kirouac, and Marco Nagle full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Michael McDermott, Gary Roy, Marc Kirouac, Marco Nagle, and any other employees who may have been adversely affected by the Respondent's discriminatory actions, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Reinstitute its smoking, performance review, and pay raise policies as they existed prior to the unlawful unilateral changes to those policies and make any employees who suffered loss of earnings or benefits because of those changes whole for their losses, with interest computed in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to its unlawful conduct, and within 3 days thereafter notify the affected employees in writing that this has been done and that its unlawful actions will not be used against them in any way.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Leominster, Massachusetts facility, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 20, 1995.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the challenges to the ballots of the following employees are overruled: Gary Roy, Marc Kirouac, and Vincent LeBlanc; and that the challenges to the ballots of Steven Custer, Michael McDermott, Stephen Howard, Jeffrey Holsopple, and Jeremy Brockman are sustained.

IT IS FURTHER ORDERED that Case 1–RC–20292 is severed from Cases 1–CA–32995 (1–2), 1–CA–33248, 1–CA–33299, 1–CA–33476, and 1–CA–33623 and that it is remanded to the Regional Director for Region 1 for action consistent with the Direction below.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 1 shall, within 14 days from the date of this decision, open and count the ballots of the employees listed above, and that he shall prepare and serve on the parties a revised tally.

If the revised tally in this proceeding reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the revised tally shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall set aside the election, dismiss the petition, and vacate the proceedings in Case 1–RC–20292.

MEMBER HURTGEN, dissenting in part.

I disagree with the judge and my colleagues on two points. First, I would not find that the Respondent violated Section 8(a)(3) and (1) of the Act either when it

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

removed employee Gary Roy from light duty work and later terminated him or when it temporarily laid off employee Marc Kirouac. Second, I would not now pass on whether a *Gissel*[1] bargaining order is necessary to remedy the effects of the Respondent's unfair labor practices.

In early April 1995, employee Marco Nagle contacted Union Agent Al Stearns about organizing the Respondent's drivers (also known as field service technicians) and warehousemen in Leominster, Massachusetts. Stearns met with several employees on April 6. Six employees, including alleged discriminatee Roy, signed union authorization cards at this meeting. Within the next few days, alleged discriminatee Kirouac and two other employees signed cards that Nagle had given them. The Union submitted all nine cards in support of a representation election petition that it filed with the Board on April 17.

Roy's regular job was that of field service technician. He had been out of work on worker's compensation for nearly 4 months when he returned to a light duty assignment on March 13. Although the Respondent was able to provide temporary light duty work for Roy and two other employees in recent years while they recovered from on-the-job injuries, it did not have a general practice of doing so.[2] Furthermore, the Respondent's written guidelines for handling worker's compensation issues recommended against temporary work assignments longer than 30 days "without a complete reassessment."

On April 21, the Respondent informed Roy that it had no more light duty work for him. At that same time, the Respondent discharged the supervisor who had delegated to Roy some menial warehouse duties to make work for him. Inasmuch as Roy was physically unable to return to full duty work, the Respondent once again placed him on workers' compensation. On May 22, the Respondent discharged Roy. A letter from Respondent to Roy explained that his discharge was "[d]ue to the length of your absence and your physical inability to return to your position as Field Service Technician." The letter offered Roy a hiring preference for any available position for which he was qualified in the event that his condition improved and he wished to reapply for work. It is undisputed that, although Roy appeared to be slowly recovering and had been cleared by his personal physician for a program of harder work, it would be several more months before he could perform the heavyweight lifting tasks required for the work of full-duty field service technician. It is also undisputed that, in the past, the Respondent has discharged several other employees who had been out of work on worker's compensation for periods of time comparable to Roy's disability period.

With respect to field service technician Kirouac, his usual delivery route included 3 days' work in Rhode Island. On April 25, the Respondent advertised for a driver at its Rhode Island facility. On May 15, the Respondent hired a driver. On May 22, the Respondent advised Kirouac that he was being laid off because it had hired the Rhode Island driver. Later that day, the Respondent rejected Kirouac's request to be retained as a replacement for a Leominster driver who had given notice that he would resign from work on June 2, the day after the election. The Respondent stated that it did not intend to fill that driver's vacancy. Indeed, it had not done so at the time of the hearing. Other Leominster drivers performed Rhode Island delivery work after Kirouac's layoff until the new Rhode Island driver began work on about June 1. On June 9, the Respondent received another Leominster driver's resignation notice. It contacted Kirouac and recalled him to work. Kirouac returned to work on June 19.

The General Counsel has alleged that the actions taken against Roy and Kirouac were part of an unlawful preelection unit-packing scheme designed to add one employee, Michael McDermott, who was considered likely to vote against the Union, and to subtract Roy and Kirouac, considered likely to vote for the Union. I disagree. I recognize that the transfer of Sales Manager McDermott back into his former unit job was unlawfully motivated by the Respondent's desire to secure an additional vote against the Union. As for Roy and Kirouac, however, the General Counsel has failed to prove that the Respondent's actions were based on their support for the Union. Specifically, the General Counsel has failed to make the requisite prima facie showing that the Respondent knew or had reason to believe that either employee was a union supporter. Absent proof of this essential element of knowledge, the complaint allegations of unlawful antiunion acts must be dismissed.

It is undisputed that both Roy and Kirouac signed union authorization cards and attended union meetings, as did nearly all other unit employees. However, they were not prominent in the Union's campaign. Fellow employee Marco Nagle made the initial contact with the Union and was the only one who distributed and collected authorization cards. Furthermore, there is no evidence that Roy or Kirouac engaged in union activity at the Respondent's workplace. The union meetings took place offsite. There is no evidence that anyone in the Respondent's management, other than prounion Supervisor Steven Custer (whom the Respondent discharged on April 20) knew which employees supported the Union. The judge did not find, and the record does not support a finding, that Custer identified union sympathizers to the Respondent. Indeed, because he was prounion, it is unlikely that he would do so.

Absent any direct evidence of the Respondent's knowledge of the prounion sympathies of Roy and Ki-

[1] See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[2] Indeed, the judge found that the Respondent did not unlawfully refuse Marco Nagle's repeated requests for light duty work in 1996 while he was recovering from a work-related back injury.

Kirouac, the judge sought to infer such knowledge. She relied on the small number of employees in the unit, testimony by the Respondent's president, Cabot Carabott, that he speculated about the union proclivities of employees, the other circumstances (animus and timing) allegedly supporting findings of discrimination, and the Respondent's allegedly pretextual explanations for its actions.

As to the first factor, this case does not present the circumstances under which the Board has drawn the inference of an employer's knowledge of union activities in a small work force. Indeed, even my colleagues decline to endorse the judge's application of the "small plant doctrine." There is no evidence here that any employee engaged in open union activity in the workplace, or that any individual who would be aware of offsite union activity, reported that activity to the Respondent. As to the second factor, the mere fact that Carabott may have speculated, at some undetermined time prior to the election, about unit employees' union sympathies does not establish that he engaged in such speculation about Roy or Kirouac or, assuming that he did so speculate, that he concluded they were in fact prounion.

As to the third factor, the judge has "bootstrapped" proof of knowledge from the General Counsel's proof of other elements assertedly supporting the allegation of antiunion motivation. The Respondent's union animus may be inferable from the McDermott transfer and from the several unlawful statements made by President Carabott in his captive audience speech to employees. However, a finding of the element of animus does not establish the different element of knowledge. Likewise, a finding of generalized animus says nothing about particularized knowledge concerning two employees. Further, without independent proof of knowledge of the two employees' union activity, there is no basis for inferring that the Respondent brought its animus to bear against them. Similarly, without proof of knowledge of the union activity of Roy and Kirouac, the timing of the alleged discriminatory actions against Roy and Kirouac, i.e., shortly after their union activity, does not warrant the inference that the Respondent took those actions because they supported the Union. My colleagues note that a given set of facts can support several different elements of a prima facie case. For example, a given set of facts may show antiunion animus and knowledge (e.g., telling a discriminatee that he will suffer for having signed a union card). However, it does not follow that proof of one element (e.g., animus through a general threat to close) will constitute proof of another element (e.g., knowledge of a particular employee's union activity).

Finally, I find no basis for inferring knowledge of Roy and Kirouac's union sympathies from the reasons given by the Respondent for the actions taken with respect to their employment. Even accepting the judge's credibility-based rejection of some of the reasons offered by the Respondent's officials for the actions taken, I cannot agree that all legitimate reasons asserted for these actions were pretextual.

Contrary to the majority, my opinion of the legitimacy of the reasons, which I discuss here, does not rest on discredited testimony. The evidence is uncontroverted regarding the Respondent's general practice with respect to the retention of disabled employees, the assignment of light duty work, the termination of the supervisor who provided light duty work for Roy from the supervisor's own duties, and the legitimate hiring of an employee to perform work that Kirouac had been performing. I recognize that the judge purported to discredit the Respondent witness's reliance on reasons assert for its action. However, as stated in *Charles Batchelder Co.,* 250 NLRB 89, 89–90 (1980):

> [T]he question of motivation where an alleged unlawful discharge [or other adverse action] is involved is not one to be answered by crediting or discrediting a respondent's professed reason for the discharge, and thus we cannot accept every credibility finding by a trier of fact as dispositive of that issue. Rather, that question is one to be resolved by a determination based on consideration and weighing of all the relevant evidence.

As for Roy, the Respondent did not have a regular practice of retaining employees on light duty assignments indefinitely. Roy was apparently only one of three injured employees given light duty assignment of any kind in recent years. Moreover, his make-work duties came from the duties of a supervisor who was terminated at the same time that Roy returned to full disability. On the other hand, Roy's discharge a month later was fully consistent with the Respondent's past practice of discharging employees for being on worker's compensation for too long a period of time.[3]

As for Kirouac, there is no dispute about the fact that the Respondent hired a Rhode Island-based field service technician to perform delivery work that Kirouac had been performing. Furthermore, there is neither allegation nor evidence that the hiring was for other than legitimate business reasons. Yet the judge surmised that Kirouac should not have been laid off because he had more seniority than one other Leominster driver, other Leominster drivers did some Rhode Island route work for the next 2 weeks, he and some Leominster drivers worked considerable overtime in the 2 weeks *before* the layoff, and

[3] The judge strained to distinguish Roy's situation from this general practice by reasoning that it should not apply to an employee on light duty whose condition was improving. Roy, of course, was not on light duty assignment at the time of his discharge. Even if he had been, there is no record evidence that such employment would indefinitely stay application of the Respondent's policy of discharging employees who are unable to perform their regular full duty work for an extended period.

another driver's resignation would create a job vacancy in the Leominster unit on June 2.

Regardless of whether the Respondent could have retained Kirouac for a while longer even if much of his work would soon be performed by a Rhode Island driver, there was nothing so irrational about its decision to lay him off that would warrant inferring the Respondent knew about Kirouac's support for the Union and wanted to prevent him from voting for it in the election. Individually and collectively, the reasons provided by the judge for her finding of pretext represent subjective speculation and substitution of her own business judgment for that of the Respondent.

Moreover, I note that Kirouac's layoff would not serve the purpose attributed to it under the General Counsel's theory of violation in this case. That is, Kirouac's layoff did not make him ineligible to vote in the election. As found by the judge, without subsequent exception by the Respondent, Kirouac had a reasonable expectancy of recall and thus remained an eligible voter.

My colleagues say that I have conjectured that the Respondent was not attempting to disenfranchise Kirouac. I have conjectured nothing. I have simply concluded that the General Counsel has not met his burden of establishing that the Respondent was attempting to disenfranchise Kirouac.

In sum, the General Counsel has failed to prove the Respondent's knowledge of the union sympathies of Roy and Kirouac. The General Counsel has therefore failed to make the requisite threshold showing that any of the challenged job actions were the result of antiunion motivation. I would reverse the judge and dismiss the 8(a)(3) allegations relating to these actions.

Finally, even if the General Counsel proved knowledge and the other elements of a prima facie case, it is clear, and I find based on the above, the Respondent rebutted that prima facie case by showing that, in any event, Roy and Kirouac would have been removed and terminated and laid off (respectively) for valid business reasons.

I would not pass on *Gissel* issues at this time. The election results were 5 to 2, in favor of the Union. My colleagues would overrule the challenges to Roy, Kirouac, and LeBlanc. I agree that they are now eligible to vote.[4] In these circumstances, there is a likelihood that the Union has won the election and will be certified. Accordingly, based on my view in *General Fabrications Corp.*, 328 NLRB No. 166 (1999), I would not resolve the *Gissel* issue at this time.[5]

[4] Although I find that Kirouac's layoff was lawful, he had a reasonable expectation of recall and was thus eligible to vote in the election of June 1. Although I find that Roy's termination was lawful, I recognize that, under the controlling majority decision here, he is eligible to vote.

[5] I would affirm the judge's findings of postelection 8(a)(5) unilateral changes on the basis of the Union's certification if there is a certification. However, inasmuch as it is not clear whether the Respondent's suspension of its performance review and pay raise policy postdated the election, I only affirm the judge's finding of an 8(a)(3) violation with respect to that action and do not pass on whether the Respondent also violated Sec. 8(a)(5).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit grievances from employees and implicitly promise to resolve them without a union.

WE WILL NOT threaten employees with discharge, loss of jobs, closing of operations, and other reprisals for supporting a union.

WE WILL NOT tell employees it would be futile to support a union and question them about their union activities.

WE WILL NOT discriminate against employees by transferring, discharging, laying off, or otherwise discriminating against them because they or other employees engaged in union activities or testified in Board proceedings.

WE WILL NOT increase our work force in order to dilute employee support for Truck Drivers Union Local No. 170, a/w International Brotherhood of Teamsters, AFL–CIO, or any other union.

WE WILL NOT make unilateral changes in wages, hours, and other terms and working conditions of employees in the following appropriate unit without first notifying the Union and giving it the opportunity to bargain over those changes. The appropriate unit is:

> All regular full-time and part-time field service equipment technicians (drivers), equipment repairmen, warehousemen, deliverymen and dispatchers, employed by the Respondent at its Leominster, Massachusetts facility, but excluding all other employees, office clerical employees, professional employees, managerial employees, confidential employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively and in good faith with the Union as the exclusive bargaining representative of the employees in the above-described appropriate unit and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, within 14 days from the date of the Board's Order, transfer Michael McDermott to his former or a substantially equivalent position, and offer Gary Roy, Mark Kirouac, and Marco Nagle full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights and privileges.

WE WILL make Michael McDermott, Gary Roy, Marc Kirouac, Marco Nagle, and any other employees who may have been adversely affected by our discriminatory actions whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them.

WE WILL reinstitute our smoking, performance review, and pay raise policies as they existed prior to our unlawful unilateral changes in those policies, and WE WILL make any employees who suffered loss of earnings or benefits because of those changes whole for their losses.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to unlawful actions taken against employees, and WE WILL, within 3 days thereafter, notify the affected employees in writing that this has been done and that evidence of our unlawful action will not be used against them in any way.

REGIONAL HOME CARE, INC., D/B/A NORTH ATLANTIC MEDICAL SERVICES

Robert J. De Bonis, Esq., for the General Counsel.
Kevin M. Keating, Esq., of Revere, Massachusetts, and *James S. Tobin, Esq.,* of Newton Upper Falls, Massachusetts, for the Respondent.
Michael P. Clancy, Esq., of Worcester, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JUDITH ANN DOWD, Administrative Law Judge. This case was heard in Boston, Massachusetts, on May 28–31, June 4–7, and 17–21, 1996, and February 12–13, 1997. Charges and amended charges were filed by Truck Drivers Union Local No. 170, a/w International Brotherhood of Teamsters, AFL–CIO (the Union) against Regional Home Care, Inc., d/b/a North Atlantic Medical Services (the Respondent or North Atlantic) on various dates commencing May 30, 1995.

On June 1, 1995, a stipulated election was held in Case 1–RC–20292 in a unit of Respondent's drivers and warehousemen. The Union won the election 5 to 2, but both the Union and the Respondent filed challenges to the ballots of a total of eight voters and the challenged ballots were determinative. The Union and the Respondent also each filed objections to the election. The Respondent alleged that a supervisor's prounion conduct tainted the election results and the Union alleged that Respondent adversely affected the election by conduct that was also alleged as unfair labor practices. On October 20, 1995, the Regional Director issued a report on objections and challenged ballots.

A complaint issued on October 24, 1995, to which the Respondent filed an answer on November 9, 1995. On November 21, 1995, the Regional Director issued an order consolidating the unfair labor practice cases for hearing with Case 1–RC–20292. On April 4, 1996, the Regional Director issued an order consolidating cases, consolidated complaint and notice of hearing (consolidated complaint). The consolidated complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by making various threats to employees, by interrogating employees about their union activities and by soliciting grievances from its employees. The consolidated complaint further alleges that Respondent violated Section 8(a)(3) and (1) of the Act by removing from light duty and subsequently discharging employee Gary Roy, by transferring employee Michael McDermott into the election unit and by laying off employee Marc Kirouac, in order to discourage employees from engaging in union and other concerted activities. The consolidated complaint also alleges that the unfair labor practices charged are so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair rerun election are minimal and that a bargaining order is required. The consolidated complaint further alleges that, after the Union won representation rights, the Respondent violated Section 8(a)(5) and (1) of the Act by discontinuing annual performance reviews and pay raises, transferring work from unit employees to employees at its other facilities, making changes in its smoking policy and issuing a warning to an employee for violating the changed policy, all without affording the Union notice or an opportunity to bargain. The discontinuance of annual performance reviews and pay raises is also alleged to have violated Section 8(a)(3) and (1) of the Act. On April 25, 1996, the Respondent filed an answer to the consolidated complaint, denying the commission of any unfair labor practices and arguing again that any union majority was tainted by the conduct of a supervisor.

On June 17, 1996, while a hearing on the consolidated complaint was being conducted, additional charges were filed by the Union. Amended charges were filed on August 1, 1996. Subsequently, the Acting Regional Director for Region 1 issued a complaint and notice of hearing. The complaint alleges that the Respondent violated Section 8(a) (3) and (1) and Section 8(a)(4) and (1) of the Act by, since about March 27, 1996, refusing to offer light duty work to employee Marco Nagle and by, on or about June 14, 1996, discharging Nagle because he engaged in union or other concerted activities and because he was named in, and gave testimony regarding, charges filed by the Union and testified at a hearing before the Board. On August 19, 1996, counsel for the General Counsel filed a motion to consolidate the additional case with those cases already being heard. On August 28, 1996, the Respondent filed an Answer denying the commission of any of the new unfair labor practices alleged. On September 6, 1996, I issued an order granting the motion to consolidate cases.

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, as well as the posttrial briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Leominster, Massachusetts, where it is engaged in the delivery of oxygen and durable medical equipment and supplies to private homes and to nursing homes. During the calendar year ending December 31, 1995, Respondent, in conducting its business operations, derived gross revenues in excess of $500,000. During the 12-month period ending May 2, 1995, Respondent, in conducting its business operations, performed services valued in excess of $50,000 in States other than the Commonwealth of Massachusetts. During the 12-month period ending May 2, 1995, Respondent, in conducting its business operations, provided services valued in excess of $50,000 for enterprises within the Commonwealth of Massachusetts, which are directly engaged in interstate commerce. At all material times, Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent delivers oxygen and durable medical equipment and supplies to private homes and nursing homes. It has facilities in Leominster and Stoughton, Massachusetts, and Providence, Rhode Island. Respondent's president is Cabot Carabott and its vice president is Andrea Howard. In 1995, Respondent employed a number of drivers, or, as they are generally referred to by the Respondent, field service technicians. Field service technicians wear a distinctive uniform of gray pants and a burgundy colored shirt with the Respondent's name on it, and work boots with steel toes.

In about the first week of April 1995, Marco Nagle, who was employed by Respondent as a field service technician, telephoned Union Organizer Al Stearns and inquired about union representation. On April 6, 1995, Stearns met with Nagle, field service technicians Leonard Christen, David Brimmer, Gary Roy, and David McAneany, as well as Steven Custer, who had the title of field service manager. Stearns spoke about the benefits of union representation. Christen, Nagle, Roy, Brimmer, Custer, and McAneany all signed union authorization cards on that date. Nagle obtained four blank cards from Stearns, which he distributed to employees William Elliot, Marc Kirouac, Vincent LeBlanc, and Barry Gaetz. Elliot, Kirouac, and Gaetz signed cards on April 9, 12, and 7, respectively.[1] After Stearns collected all nine of the union authorization cards, he sent them to the Board with the Union's petition for an election. On April 17, 1995, the Board docketed the petition and sent a facsimile copy to the Respondent. Respondent and the Union subsequently entered into a stipulated election agreement, which was approved by the Acting Regional Director for Region 1 on May 2, 1995. The election was set for June 1, 1995.

B. The 8(a)(1) Allegations Involving President Carabott

Prior to the election, Respondent's president, Cabot Carabott, held two mandatory employee meetings in the conference room of Respondent's Leominster facility. The second meeting was held on May 23. During one of these meetings, Carabott questioned the employees as to why they wanted a union. Carabott told them if they wanted a union, there was a company down the street where they could work. He said, that, for him, running the Respondent was fun and, when the fun stopped, it was "pretty much over" or he would get out of the business. Carabott also spoke about a friend of his who owned another company that went out of business after the employees chose to be represented by a union.

At one of the meetings, Carabott told the drivers that generals do not plan for a battle, they plan to win the war. Carabott said that he did not lose many wars and that he was not going to lose this one. Carabott also told the drivers that the Respondent's wages and benefits were competitive, and that, even if the Union got in there would be no extra benefits. Carabott said that the Union could offer anything but that it was his company and he had the final say as to what would be given. Carabott also said that he had an open-door policy, and that if the drivers had any problems they should come and see him.[2]

In the days before the election, Respondent distributed two memoranda to employees. In the first memo, which was mailed to employees, Carabott wrote:

> *Remember*, a union cannot promise you anything. They can negotiate, but only an Employer can deliver wages, benefits and jobs. I am convinced a union is not in the best interests of NAMS, its Patients, or it's (sic) Employees.

In the second memo, which was given to employees with their paychecks, Carabott wrote:

> I would like to explain to you why I am opposed to a Union.
>
> One of the primary reasons is a union could endanger the financial stability of this company and also the livelihood that enables you to provide for your family.
>
> If this company is Unionized:
>
> *Do you think hospitals will continue to refer patients to a Union company where Union activity could jeopardize patient service and well being?
>
> *Do you think Nursing Homes will continue to do business with a Union company where the ability to obtain product for their patients could be jeopardized?
>
> *Do you think HMO's and Insurance Companies will negotiate contracts with a union company whose patients could be jeopardized by non-delivery of oxygen?
>
> What I mean by jeopardize is the possibility of a Union strike, where disruption means loss of business and loss of jobs.

[1] Although Kirouac's card is dated April 6, 1995, he did not actually sign it until April 9. Kirouac credibly testified that he used the date April 6 because that is when most of the other employees had signed their cards and he thought he should match that date.

[2] The above is a composite of the credible testimony of a number of employee witnesses, whose testimony, while not exactly the same in every detail, was substantially corroborative on significant matters. Carabott denied most of the damaging aspects of their testimony, but, in many respects, the second memo gives flavor to some of the employee testimony and further convinces me of its reliability. I also found Carabott generally not to be a candid or reliable witness.

> Just look at Union activity around the Worcester area, no one wins!
>
> Your decision to vote yes or no should not be taken lightly.

Several parts of the Carabott speeches and memos are alleged to have amounted to threats of reprisal. Those allegations must be considered within the context of the Supreme Court's guidance in *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969). *Gissel* teaches that the words written or spoken by an employer to employees in antiunion speeches, as delivered and understood, are crucial to the determination of whether an employer has simply told employees "what he reasonably believes will be the likely consequences of unionization that are outside his control"—a prediction which is considered lawful comment; or has made "threats of economic reprisal to be taken solely on his own volition"—unlawful coercion. Id., quoting from *NLRB v. River Togs*, 382 F.2d 198, 202 (2d Cir. 1967). A lawful prediction "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." Id.

Some of Carabott's statements are clear violations. His statement that," if employees wanted a union, they could work for a company down the street" has no hint of a prediction and amounts to an implied threat of discharge or job loss. *See Tualatin Electric,* 312 NLRB 129, 134 (1993). His questioning why employees wanted the Union, thus suggesting that they reveal their union sympathies in public, was likewise unlawful, particularly in view of the implied threat that followed the questioning. Carabott's remarks that there would be no extra benefits even if the employees chose union representation and his comments about having the final say and being in a war suggested the futility of even going through the process of choosing a union. No suggestion was made that the lack of improvements would be due to hard but good-faith bargaining. In view of Carabott's other unlawful statements, the futility of selecting the Union suggested by Carabott could reasonably have been attributed to Respondent's recalcitrance. Such statements are violative of the Act. See *Marshal Durbin Poultry Co.,* 310 NLRB 68, 74 (1993). Finally, Carabott's stated open-door policy and suggestion that employees come to see him about their problems amounted to a solicitation of grievances with the implied promise that they would be resolved without the Union. There was apparently no previous policy of this type, but, in any event, in context, Carabott was being conciliatory towards employees in order to get them to drop their support of the Union. Such conduct is also violative of the Act. See *Capitol EMI Music*, 311 NLRB 997, 1007 (1993).

Carabott's other statements must be considered in the context of the other unlawful statements made in his speeches as well as Respondent's contemporaneous and discriminatory personnel actions, discussed later in this decision. Although those statements were ostensibly framed in terms of what might happen after a union victory, in context, those statements could be and reasonably were viewed as telling employees what Respondent would do to defeat the Union. Thus, Carabott's statement that another company, which he did not specifically identify, went out of business after the employees chose union representation implied that Respondent's employees too would suffer the same fate. There was no suggestion that Respondent's action would be taken as a result of matters outside of its control. Particularly in view of Carabott's implied threat of reprisal in suggesting that employees go elsewhere if they wanted a union and his statement that he was in a war to win, the employees could not miss the threat. Carabott's statement, in his second memo, that the Union would strike, thus jeopardizing Respondent's business and causing the loss of jobs is of the same type. Although couched in terms of loss of customers, there was no objective, factual basis for Carabott's statements. There was no basis for assuming that the Union would strike in the event it won bargaining rights. In view of Carabott's unlawful statement that choosing a bargaining agent would be futile, employees could reasonably conclude that the parade of horribles set forth by Carabott would not follow good-faith bargaining and stem from factors beyond his control. Indeed, the reference to loss of jobs was itself unlawful because strikers retain their employee status during a strike. See *Baddour, Inc.,* 303 NLRB 275 (1991). Finally, I find that Carabott's statement about what would happen after the fun stopped was also coercive. Although standing alone, that statement might be interpreted as an expression that, when the fun stopped, Carabott would quit his job, I find that, in context, the statement was intended to convey, and was understood to convey, a threat that Respondent would go out of business if the Union won representation rights. This finding is inescapable in view of the absence of any other evidence that Carabott intended to quit and Carabott's other threats. See *Mediplex of Danbury*, 314 NLRB 470, 471 (1994); and *Seville Flexpack Corp*., 288 NLRB 518, 529–531 (1988).[3]

C. The Allegations of Discrimination

1. The transfer of Michael McDermott, the removal from light duty and discharge of Gary Roy, and the layoff of Marc Kirouac prior to the election

The General Counsel alleges that Respondent removed union supporter Roy from a light duty assignment on April 20, 1995, and thereafter, on May 22, discharged him; transferred McDermott into the election unit on April 20; and laid off union supporter Kirouac on May 22—all for discriminatory reasons. The General Counsel also alleges that the McDermott transfer was accomplished to preclude Kirouac from being employed on election day, June 1, and, in adding McDermott, an anti-union employee, to the election unit, Respondent sought to unlawfully affect the election results by packing the unit. Respondent denies any discrimination in these personnel actions. Not only are the allegations interrelated, but, because each of these employees voted a challenged ballot, their eligibility essentially turns on whether their unit ingress and egress was violative of the Act. I find that the General Counsel has proven that there was a discriminatory reason for each of these personnel actions and that the Respondent offered pretexts in explanation. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).[4]

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[3] I do not find violative, either standing alone or in context, Carabott's statement in the first memo concerning an employer's control over wages and benefits and his opinion that a union was not in the best interests of the employees. That statement and that opinion did not have the same coercive import as the other statements considered above.

[4] It is well settled that if the Respondent's reason for its action is pretextual, that fact supports the General Counsel's showing of discrimination and defeats any attempt by Respondent to show it would

(a) McDermott

Michael McDermott was hired by the Respondent as a field service technician in August 1988. Sometime in 1994, McDermott was appointed to the position of warehouse supervisor, earning $13 per hour. On September 23, 1994, the Respondent promoted McDermott to a sales position at a salary of $600 per week. Respondent's vice president, Andrea Howard, announced the promotion at one of the regular meetings of field service technicians that she conducted. Howard told the employees that McDermott would no longer do the "on call" assignments that were required of the field service technicians. Howard also stated that his duties would include sales, getting new accounts, and keeping existing accounts. Howard told the drivers that McDermott would be servicing the nursing homes and "smoothing out any problems that would arise from the nursing homes."

After Howard announced the change in McDermott's assignment, he no longer was required to take on-call duty, his name was removed for the on call schedule and his name appeared on the telephone roster under "sales." McDermott's name appeared on payroll records under the sales department. McDermott stopped wearing the field service technicians' uniform and began wearing a suit and tie to work. McDermott stopped driving Respondent's trucks and began driving Respondent's station wagon, which he took home every day. McDermott also stopped being paid on a per hour basis and began to be paid a weekly salary. Respondent also purchased business cards for McDermott which stated that he was the "Area Sales Manager."[5]

On April 21, 1995, McDermott was transferred back to a field service technician position. There is uncontradicted testimony that, following his transfer, McDermott told employee Marco Nagle "that he couldn't wait until all this was over so he could get back in his job" and told employee Marc Kirouac that he wanted his old job back, that he did not like being a field service technician, that it was much harder work physically, and that he liked being in sales. McDermott voted in the unit election on June 1, 1995, and also acted as an election observer for the Respondent.

Both Vice President Howard and McDermott explained McDermott's transfer as stemming from his request to return to a field service technician's position because McDermott wanted to make more money. McDermott also testified that, in mid-April, he talked to field technician David McAneany, who submitted his resignation to Howard about a week before its effective date of April 21. As a result, according to McDermott, he asked Howard whether he could return to the position of a field service technician. I find these explanations completely incredible. Documentary evidence establishes that McDermott actually took an 11.3-percent pay cut to return to a driver's position. Moreover, the testimony of Howard and McDermott is refuted by McDermott's statements to two employees that he could not wait to get back into his old job. His reference to waiting until "all this was over" is clearly a reference to the union campaign, which was the only unusual thing happening that could have inspired such a comment. Indeed, McDermott's somewhat sudden transfer is unusual in several respects. There was no clear evidence as to any replacement for McDermott in his former sales position. Moreover, Respondent had been advertising in the local newspaper at this time for Leominster drivers. In these circumstances, it seems a fair inference that the transfer of McDermott was motivated by an effort to get a positive antiunion vote into the unit. Respondent's explanation for the transfer is so unconvincing that it amounts to a pretext.

McDermott's transfer into the unit, of course, also took place within days of the filing and receipt of the Union's election petition. The petition was filed on April 17 and was transmitted by fax to the Respondent the same day. Since the union activity that spawned the petition obviously came from employees in the unit and McDermott was not among them, and since McDermott was the Respondent's election observer, it is clear that the transfer of McDermott into the unit would give Respondent another vote against the Union. Carabott testified that he speculated on the union sentiments of his employees and he knew at least two other employees, relatives of management, were solid antiunion votes. Another employee, who was a relative of management, could also reasonably be viewed as antiunion. The timing of the transfer, its unusual circumstances, the pretextual explanation for it and Respondent's other unfair labor practices lead inescapably to the conclusion that Respondent was trying, for discriminatory reasons, to pack the election unit in order to dilute the Union's strength. Such conduct is violative of the Act. See *Maxi-Mart,* 246 NLRB 1151, 1160 (1979); *Suburban Ford*, 248 NLRB 364 (1980); and *Einhorn Enterprises*, 279 NLRB 576, 596 (1986).

(b) Roy and Kirouac

Field service technician Gary Roy, who had been on worker's compensation since November 19, 1994, after an on-the-job shoulder injury that required surgery, was placed on light duty on March 13, 1995. His treating physician, Dr. Marshall Katzen, placed lifting restrictions on him. His light duty work consisted of working in the warehouse doing paperwork and dispatch work under the supervision of Field Service Manager Steve Custer. Later, he moved trucks around the parking lot and to maintenance.

On April 20, 3 days after Respondent received the Union's election petition, Roy was told that Respondent had no more light duty for him and that he was being put back on full worker's compensation pending further reevaluation. That same day, Steve Custer was terminated.

On May 22, 1995, Vice President Howard terminated Roy for what she said was the length of his absence and a physical inability to return to this position as a field service technician. Just a few days before, on May 16, 1995, Roy's doctor, Dr. Katzen, had cleared Roy to return to work on a "work hardening" program that would gradually have him lifting heavier amounts. Roy notified Howard of Dr. Katzen's clearance that same day.

Also, on May 22, Respondent laid off Marc Kirouac, a Leominster-based field service technician, for what Vice-President Howard told him was lack of work. Kirouac questioned the reason given by Howard for the layoff because he said he had worked over 60 hours the previous 2 weeks, a statement that was supported by documentary evidence (RX

have acted the same way absent discrimination. See *National Steel & Shipbuilding Co.,* 324 NLRB 1114, 1119 fn. 11 (1997).

[5] Both McDermott and Vice President Howard tried to refute or explain away the fact that McDermott had left the unit or was in a sales position. I find their attempts incredible, implausible, and contrary to the weight of the evidence. Their testimony in this respect reflects adversely on their general reliability on all issues to which their testimony was addressed.

55). Howard told him, however, that she had hired a Rhode Island-based driver, which she apparently had, on May 15. Leominster drivers had been performing the Rhode Island-based work with Kirouac doing most of it; he devoted about 3 days a week to such assignments. Howard admitted, however, that Leominster-based drivers continued to perform Rhode Island work until late May or the beginning of June (Tr. 986–987).[6]

On the same day, May 22, Kirouac apparently learned that another Leominster-based driver, Vincent LeBlanc had submitted his letter of resignation on May 15 to be effective June 2, the day after the Board election. Kirouac went back to ask Howard if he could have LeBlanc's position. Howard told him that LeBlanc was not being replaced.

On June 9, 1 week after the election, driver David Brimmer resigned effective June 23. Howard called Kirouac and asked if he wanted to return to work. He agreed and began working again on June 19. Thus, Kirouac was off work less than a month, but did not work on election day because he was on layoff status.

The evidence overwhelmingly supports the inference, which I make, that, combined with the unlawful transfer of antiunion employee McDermott into the election unit, Respondent ousted union supporters Roy and Kirouac from the unit shortly before the election as part of a scheme to dilute the prounion vote. My finding of discrimination is based on the timing of the ousters, the contemporaneous personnel changes, which were handled in a disparate manner, and the pretextual explanations for Respondent's treatment of Roy and Kirouac. Respondent's animus is well established not only by the unlawful speeches and statements of its president, but by the unlawful transfer of McDermott into the unit. The prounion proclivities of Roy and Kirouac are, of course, established by the evidence showing that they both signed union authorization cards and attended union meetings.

Less than 3 days after receiving the election petition, Respondent removed Roy from light duty. Respondent's reasons for doing so are pretextual. First, Respondent asserts, relying on the testimony of Vice President Howard, that Roy was originally placed in the warehouse in order to meet the requirements of a November 14, 1994 report of the Joint Commission of Accreditation of Health Organizations (JCAHO), which stated that a focus survey would be scheduled to see if certain deficiencies in the warehouse were cured. That focus survey was to be scheduled within 6 months of official notification. (GC 36 Exh.) Roy credibly denied being told that this was why he was assigned to the warehouse for light duty. Indeed, the temporary work assignment slip authorizing Roy to perform light duty work lists his duties but says nothing about preparing for the focus survey. In any event, it is clear that Respondent knew at this time of Roy's physical limitations. Even assuming that preparation for the focus survey required more physical work than Roy could perform, as Respondent later contended when he was taken off light duty, it clearly knew of his physical limitations when it put him on light duty in the first place. It is unlikely that Respondent would have told Roy that he was put on light duty to perform work that was beyond his abilities.

Howard's April 21 note stating that Roy was taken off light duty in part because "JCAHO survey is to take place in 5–6 weeks and warehouse personnel must be fit and able to perform [relevant] tasks" is unpersuasive. There is no corroborative or documentary evidence as to a recent notification of the date of a focus survey in the warehouse or even whether there was a survey at all, even though Respondent had known since November 1994 that there might be such a survey. Indeed, in its brief to me, Respondent does not assert that the warehouse survey preparation work was actually performed in the next "5–6 weeks"; nor does it state by whom or when such a survey was ever performed. Howard also testified that, immediately after receiving the JCAHO report in the fall of 1994, Respondent tried to cure the deficiencies mentioned in the report and that the effort was ongoing (Tr. 1173–1175). This, however, seems in conflict with her view that something had to be done in the spring of 1995 that required Roy to be taken off light duty. Howard's testimony in this respect is thus not only unpersuasive, implausible and contrary to the other record evidence, but it is of a piece with the rest of her testimony, which I found generally unreliable.[7]

The second reason offered by Respondent, also based on Howard's testimony, was that Roy's performance in the warehouse was inadequate. Actually, Howard made an unusual effort while on the witness stand to trash Roy's work performance. The main problem with this testimony is that Howard's own April 21 note taking Roy off light duty mentions nothing about Roy's work being inadequate. There is no corroboration of Howard on this point, not even from Custer whom Respondent called as its own witness. Here again, Howard's testimony is revealed as unreliable and her explanation a pretext.

Finally, again in reliance on Howard's testimony, Respondent asserts that its decision was based on worker's compensation guidelines from its consultant, J.H. Albert, which stated that "temporary alternate work should not last any longer than [30 days] without a complete reassessment." (R. Exh. 61 at 12–13 & Tr. 1783–1786.) Again, no mention of this was made to Roy when he was taken off light duty on April 21. Respondent did not even consider a medical reassessment at this time although it allegedly did before terminating Roy a month later. But, in any event, the guidelines do not require the removal of employees from light duty after 30 days. More importantly, because of Howard's unreliability elsewhere in her testimony and her failure contemporaneously to mention the guidelines in her April 21 note or otherwise, I believe that this reason was an afterthought in an attempt to buttress Respondent's case.

In these circumstances, I find that Respondent's removal of Roy from light duty on April 21 was motivated by a desire to get him out of the election unit because Respondent feared that he would vote for the Union.

Respondent's reason for discharging Roy on May 22, 1995, is also pretextual. Again relying on Howard's testimony, Respondent asserts that the determining factor in this decision was a report by Dr. John Coldeway, apparently prepared at the di-

[6] Since the election unit was limited to Leominster based drivers, the newly hired Rhode Island driver was not included in the election unit. There appears to be no documentary evidence confirming the hire or the date of hire.

[7] Significantly, Howard was asked by Respondent's counsel whether the Commission notified her of a followup visit. She gave an evasive response. She did not say that there was a followup visit or give any details about it. She said, "They do, a week prior to the survey" and then discussed generally what the Commission would or could do. (Tr. 1023–1024.) This was a theoretical response to a specific question.

rection of Respondent's insurer, the Travelers Insurance Company, based on an examination of Roy on May 15. That report stated that Roy would not reach maximum medical improvement until 9 to 12 months after surgery, which, in Roy's case, had taken place in January 1995. The difficulty with this reason, and Howard's testimony, is that the receipt date on the report stated that the Traveler's Insurance Company received the report on May 30, a week after Roy was discharged. Even assuming, however, that Howard had received the report and relied on it before firing Roy, that report does not support Respondent's position. Coldeway's prognosis for Roy was that he would likely have a good result without any significant loss of function. Indeed, Roy's own doctor stated, during a May 16 examination, that he was sending him back to work on a "work hardening" program. In these circumstances, I find that the real reason for Roy's termination was to prevent him from voting in the June 1 election and thereby remove a prounion employee from the voting rolls.[8]

Coming on the heels of the discrimination attendant to McDermott's transfer and Roy's removal from light duty and discharge, Kirouac's layoff was, I find, similarly motivated. The circumstances surrounding Kirouac's layoff and Respondent's pretextual explanation for it confirm that the layoff was discriminatory and part of Respondent's plan to dilute Union strength in the election. The timing of the layoff strongly supports my finding of discrimination, but Respondent claims, again through the testimony of Howard, that Kirouac was no longer needed because he did mostly Rhode Island work, it decided that it needed a driver exclusively based there and it hired one, Raymond Lamoureax, on May 15, about a week before the Kirouac layoff. These reasons are pretextual. There was no immediate need for the layoff from a business perspective because Howard conceded that Leominster drivers continued to service Rhode Island until late May or early June. Indeed, the most immediate need for the layoff appears to have been for Respondent to remove Kirouac from the election unit before June 1, the date of the election.

Moreover, even apart from the Rhode Island work, there was no need to lay off Kirouac, who was regarded highly enough to be recalled shortly after the election and had more seniority than at least one driver, Jeffrey Holsopple, Howard's son-in-law. Kirouac had worked at least 60 hours in each of the 2 weeks before his layoff. Indeed, other Leominster drivers also worked considerable overtime in the 2 weeks before the layoff, according to documentary evidence. Furthermore, another Leominster driver, Vincent LeBlanc, had just announced his resignation, but, when Kirouac asked to be considered for the vacancy thus created, Howard said that LeBlanc was not being replaced. No explanation for why LeBlanc was not being replaced was given by Howard either to Kirouac at the time or in her testimony, and none was offered by Respondent in its brief. Respondent's treatment of Kirouac stands in stark contrast to the immediate transfer into the unit of antiunion salesman McDermott to fill McAneany's vacancy the month before. Indeed, Respondent's discriminatory motivation in keeping Kirouac off the election rolls on June 1, just 8 days after his layoff is confirmed by its subsequent treatment of Kirouac. In early June, after the election, Kirouac was recalled, but, although he was on layoff less than a month, he was not on Respondent's election eligibility list. Howard's testimony suggesting that her layoff of Kirouac was benign is as unreliable as the rest of her testimony. The layoff was violative of the Act.[9]

2. The discharge of Marco Nagle

As set forth above, Nagle was the leading union activist in Respondent's employ. He was the first employee to contact the Union about organizing the Respondent's employees. He was the only employee who distributed and collected authorization cards, and a number of the charges filed in this case involved Nagle. He also testified in the first part of these proceedings, on May 31, 1996, at which time he explicitly revealed his leadership role in the union campaign. Vice President Howard was in the hearing room when he testified. Two weeks later, on June 14, 1996, while the hearing was still in session, Howard fired Nagle.

In the meantime, Nagle had been off work since March 25, 1996, when he hurt his back on the job while carrying an oxygen tank. He received medical attention from Prime Med, an outpatient facility that provides emergency health care for Respondent's employees. He was released by Prime Med to return to work, subject to severe restrictions, which were relaxed somewhat on April 9. Nagle continued to visit Prime Med and, after each visit, the last of which was June 10, 1996, he delivered copies of "medical treatment authorizations" to Vice President Howard or other representatives of Respondent. On most of these occasions, he asked for, but was refused, light duty work.

Nagle was also referred to Dr. George Lewinnek for treatment. In an April 23 report, following receipt of MRI results, Dr. Lewinnek described Nagle's problem as four degenerated discs with "minimal to moderate bulges." He said that they were "sufficiently small so that I would expect recovery without surgery." Nagle was also scheduled for a number of sessions of physical therapy, some of which he missed for good and sufficient reason, based on his uncontradicted and credible testimony. In mid-May, a representative from Traveler's Insurance Company, Respondent's worker's compensation carrier, told Nagle that his physical therapy allocation had ended.

On May 14, 1996, Dr. Lewinnek examined Nagle again and set forth certain lifting restrictions. He also recommended a "work hardening" regimen and estimated, in a note delivered by Nagle to Respondent, that he could return "to full duty" on June 6, 1996. On June 3, 1996, Nagle was examined by an independent doctor, Richard Hawkins. Dr. Hawkins' report, which was delivered sometime after the examination, stated that Nagle was a candidate for further physical therapy and estimated another 8 weeks of therapy before "reaching maximum medical improvement." He also recommended light duty work with some lifting restrictions.

[8] In its brief, Respondent points out that its discharge of Roy was consistent with its policy of discharging employees for being on worker's compensation for too long a period of time. That argument does not deal with employees who, like Roy, were on light duty and whose condition was improving. Nor does it deal with an employee, like Roy, whose discharge was proved to have been union based with Respondent's reasons shown to have been pretextual.

[9] I reject Respondent's assertion that it did not know that Roy and Kirouac were prounion. I infer such knowledge from the small number of employees in the unit, Carabott's admitted speculation about the union proclivities of employees, the other circumstances supporting the findings of discrimination, and Respondent's pretextual explanations for its actions. See *Montgomery Ward & Co.*, 316 NLRB 1248, 1252–1253 (1995).

On June 14, 1996, Nagle met with Howard in her office, at her request, and was terminated. She asked how he was doing. He replied that he did not know because he was waiting for the report of Dr. Hawkins. Howard then handed him a letter prepared before their meeting and dated June 13, 1996, which stated that he was being terminated "[d]ue to the length of your absence and your physical inability to return to your position as Field Service Technician."

The General Counsel has proved that Respondent fired Nagle because of his union activities and his testimony before the Board in the first part of this case. The evidence is overwhelming that these were reasons for his discharge. Respondent has shown by its other unfair labor practices that it was willing to discriminate against employees for union reasons. Nagle had been shown, through his testimony and that of others, to be the moving force and the leading employee activist in the union campaign that Respondent fought through unlawful threats and coercion. The timing of the discharge in the midst of the hearing, at which time Respondent learned definitively of Nagle's leadership role, solidifies the finding of discrimination under the first part of the *Wright Line* analysis. See citations supra.

It thus falls on Respondent to show that it would have fired Nagle even in the absence of his union activities and his participation in the Board hearing. Respondent has not met that burden. Respondent's position is that Nagle was fired essentially for being on worker's compensation for too long without the prospect of returning to work as a field service technician. But the evidence shows that Nagle was only off work for about 3 months after his injury and he was continually improving, as his medical reports clearly show. Respondent points to evidence that it asserts shows that it had a practice of discharging employees on worker's compensation. There was, however, no precise or written rule on the subject. Some of Respondent's drivers had been on worker's compensation longer than Nagle but had not been discharged.[10]

Howard also testified that her termination decision was based on learning that Nagle might need surgery and that Nagle had missed a number of physical therapy sessions. That testimony is unpersuasive and her explanation is a pretext. Howard admitted that she made the discharge decision before the conversation on June 14, in which Nagle allegedly suggested that he might need surgery. Moreover, Nagle credibly denied he told Howard in this conversation that he needed surgery. Neither doctor who examined Nagle suggested surgery and Dr. Lewinnek recommended against it, saying he would be "cautious" about the matter. As for the missed therapy sessions, that matter was likewise unknown to Howard until after the discharge decision was made on June 13, 1995. Indeed, she never mentioned the matter to Nagle at any time prior to her decision to fire him. Not only did Nagle credibly explain his missed therapy sessions, but Dr. Hawkins suggested more therapy after his June 3 examination. In these circumstances, Howard's elaboration of her justification for discharging Nagle does not aid Respondent's case, which, in any event, is insufficient to overcome the strong evidence of discrimination. I therefore find that Respondent's termination of Nagle violated Section 8(a)(4), (3), and (1) of the Act.[11]

[10] I make no finding or comment on the legality of Respondent's position under state law.

D. The Election Objections and Challenged Ballots

Pursuant to a stipulated election agreement executed by the Employer and the Union, and approved by the Acting Regional Director for Region 1 on May 2, 1995, an election was conducted on June 1, 1995, in an appropriate unit of the Respondent's employees. The unit was described as follows:

> All regular full time and part-time field service equipment technicians (drivers), equipment repairmen warehousemen, delivery men and dispatchers, employed by Respondent at its Leominster, Massachusetts facility, but excluding all other employees, office clerical employees professional employees, managerial employees, confidential employees, guards and supervisors as defined in the Act.

The issues to be resolved are whether (1) the challenges to the ballots of eight employees are to be sustained and (2) the objections of the Union and the Respondent have merit.

1. The challenges

As indicated above, the ballots of eight individuals were challenged, some by the Board agent conducting the election because the individual was not on the eligibility list provided by the Respondent, some by the Union, and some by Respondent. In general, to be eligible to vote an employee must have been employed both on the eligibility date, which, in this case, was April 23, 1995, and on the election date, which, in this case, was June 1, 1995. See *Plymouth Towing Co*., 178 NLRB 651 (1969). Discriminatory personnel actions cannot, of course, be used to make an employee eligible or ineligible to vote in a Board election.

McDermott, Roy, and Kirouac

In view of my findings set forth above that Respondent violated the Act by unlawfully transferring McDermott into the election unit and ousting Roy and Kirouac during the preelection period, it follows that McDermott should not have been allowed to vote in the election and that Roy and Kirouac should have been permitted to vote. Even apart from the discrimination against Kirouac, however, the circumstances surrounding his layoff and recall demonstrate that he should have been permitted to vote. There was much turnover at the time and he was actually recalled shortly after the election. Thus, he had a reasonable expectancy of recall when he was laid off immediately before the election. See *Allstate Mfg. Co.,* 236 NLRB 155 (1978); and *D.H. Farms Co.,* 206 NLRB 111 (1973). Accordingly, the challenge to McDermott's ballot is sustained and the challenges to those of Roy and Kirouac are overruled.

Steven Custer

Steven Custer voted a challenged ballot because his name did not appear on the voter eligibility list provided by Respon-

[11] I find that the General Counsel has not proved by a preponderance of the evidence that Respondent discriminatorily denied Nagle light duty work. Although the evidence shows that other employees on worker's compensation were permitted to do light duty work and Nagle asked for such work, there is no evidence that such work was available when Nagle asked for it. In my view, the General Counsel had the burden of proving that such work was available in Nagle's case and was unable to do so on this record. Accordingly, the allegation that Respondent discriminatorily denied Nagle light duty work is dismissed.

dent, which alleges that he was a supervisor within the meaning of Section 2(11) of the Act. Respondent also alleges that his prounion activities as a supervisor tainted the Union's majority and requires that the election be set aside. The Union alleges that he was an employee and, in any event, his prounion activities did not require that the election be set aside. I will deal with the supervisory taint issue later in this decision. As for Custer's eligibility, however, I fail to see any way that the challenge can be overruled, whether he was a supervisor or an employee. He was terminated on April 20, 1995, 3 days before the eligibility date and a charge alleging his termination violated the Act was dismissed by the General Counsel, acting through the Regional Director. He was thus not eligible to vote and his vote cannot be counted.

LeBlanc

On about May 14 or 15, field service technician Vincent LeBlanc submitted a letter of resignation to Respondent effective June 2, 1995. During the last week of his employment he took his vacation, which he had earned and for which he was paid, and he was issued his last paycheck on June 8, 1995. Because LeBlanc was on the payroll on election day, his resignation did not take effect until the day after the election and he was on paid vacation until then. He is entitled to vote and the challenge to his ballot is overruled. See *Harold M. Pittman Co*., 303 NLRB 655 fn. 3 (1991).

Stephen Howard, Jeffrey Holsopple, and Jeremy Brockman

The ballots of three employees, Stephen Howard, Jeffrey Holsopple, and Jeremy Brockman, were challenged because of their close family relationship to Vice President Andrea Howard and President Cabot Carabott and their "special status" as a result of that relationship. Section 2(3) of the Act excludes "any individual employed by his parent or spouse" from the definition of an employee. However, even apart from statutory considerations, an employee may be excluded from voting in a Board election if he or she is a close relative of a nonowner manager of an employer and has a "special status" with the employer as a result of that relationship. The Board considers such matters in determining whether the employee has a sufficient community of interest with unit employees to be included with them in a collective-bargaining context or is more closely aligned with management. See *Allen Services Co.*, 314 NLRB 1060, 1062 (1994).

Steven Howard is the husband of Vice President Andrea Howard. He was hired directly by his wife. He came on initially as a temporary employee at a time when he had a heart condition in June 1993. He was later made a full-time employee and now performs maintenance and repair work. His job title is "repair technician." He works "entirely alone" and is essentially unsupervised in the back of the building adjacent to the warehouse area. Custer testified that Howard did not "fall under me" and, certainly after Custer's discharge, if anyone supervised Stephen Howard, it was his wife. He received an evaluation in 1993 from a Peter Krawchuk, who is no longer employed, and another in 1996 from his wife. He received no other evaluations in the interim, even though other employees, at least in 1994 and through April 1995, were evaluated annually. He also received a pay raise after his wife's 1996 evaluation of him. Stephen Howard's hourly pay is considerably less than his wife's salary as corporate vice president.[12] Thus, I conclude that he is, at least to some extent, financially dependent on her. I also find that, because he works alone, is supervised directly by her, and was treated differently from other unit employees, he has a special status that requires him to be excluded from the election unit.

Jeffrey Holsopple is the son-in-law of Vice President Howard and her husband Stephen Howard. He lives with his family in an apartment owned by the Howards. He does not pay rent but does upkeep and maintenance in lieu of rent. He was referred to Custer for hire by Vice President Howard. Unlike other field service technicians, Holsopple was not required regularly to punch in. He could write in his own hours and his timecard did not have to be approved, unlike those of the other drivers. Custer testified that he "really didn't say anything because [Holsopple] was the son-in-law." (Tr. 532.) Moreover, Holsopple was retained when Kirouac was laid off, even though he had less seniority than Kirouac. In these circumstances, I find that Jeffrey Holsopple was closely aligned with, and financially dependent on, a high management official and received special treatment by virtue of his familial relationship. Particularly in view of the smallness of the unit, his close relationship with management requires his exclusion from the unit. He was not therefore entitled to vote in the Board election and the challenge to his ballot is sustained.

Jeremy Brockman is the son-in-law of President Carabott. He began working for Respondent in August 1994 as a "project analyst," familiarizing himself with the functions of every department. He had graduated in May 1994 from the University of Missouri with a bachelor's degree. In April 1995, he was placed in the dispatcher's position to replace Custer immediately after Custer was fired. Respondent alleges, and I find, infra, that Custer was a supervisor within the meaning of the Act. When he was transferred to the dispatcher's position, Brockman went from salary to hourly pay, but Brockman was apparently not given all of Custer's responsibilities, thus ensuring that he would not have the same supervisory cast Respondent attributed to Custer. Brockman nevertheless reports directly to Vice President Howard and meets with her on a daily basis. He was also given a special project by Howard to prepare certain exhibits that were used in this case to support Respondent's defense. (Tr. 1307.)

Brockman lives with his wife, President Carabott's daughter, in a house owned by Carabott, and he drives Carabott's car to and from work. Brockman's name did not appear on Respondent's payroll register until the payroll period beginning May 1, 1995, about 10 days after he took over the dispatcher's position and about a week after the election eligibility date. At that point, he was paid 12.50 per hour more than any other employee in the unit except for McDermott, who was discriminatorily transferred into the unit.

It appears that Brockman was being trained by Respondent for broader responsibilities than he presently has. He was placed into the breach, so to speak, when Custer was fired. Because Brockman is at least to some extent financially dependent on his father-in-law, the president of Respondent, because the circumstances in connection with his taking over Custer's former job demonstrate a special status, and because

[12] According to documentary evidence (GC Exh. 44), Stephen Howard earns $10.50 per hour and Vice President Howard is compensated at a rate equivalent to $34.90 per hour.

there is considerable doubt as to his payroll status as of the election eligibility date. I find that Brockman does not have a community of interest with the rest of the employees in the unit. He is thus not entitled to vote and the challenge to his ballot is sustained.

In sum, the ballots of Roy, Kirouac, and LeBlanc must be opened and counted. The ballots of Custer, McDermott, Howard, Holsopple, and Brockman need not be opened and counted. After making the appropriate adjustments, the Regional Director must prepare a new tally and certify the election results, subject to the following rulings on objections.

2. The Respondent's objection to the election

Respondent filed a timely objection to the election alleging that Steven Custer was a supervisor and, as such, he engaged in the type of prounion activities that would taint any union majority and require that the election be overturned. The Union alleges that Custer was an employee and that, even if he was a supervisor, his prounion activities did not require that the election be set aside. I agree that Custer was a supervisor, but I find that his prounion activities did not adversely affect the election or require that the election be set aside.

First, I address the question as to whether Custer was a supervisor within the meaning of the Act. Although the answer is not entirely free from doubt, I find that he was indeed a supervisor. Custer was Respondent's field service manager who worked in an office in its warehouse. His duties included some maintenance and driving and he dispatched the drivers, something that Howard testified was an important part of Custer's job and occupied half of his workday (Tr. 1238). The dispatching function is not necessarily one that establishes supervisory status. As the Seventh Circuit recently acknowledged, the distinction between supervisors and employees "is not always . . . easy . . . to draw, and a position as a dispatcher is one which falls on the line." *NLRB v. Joy Recovery Technology* Corp., 134 F.3d 1307, 1309 (7th Cir. 1998).

It does appear, however, that Custer performed some additional functions that were supervisory in nature. He supervised the work of employee Roy when Roy performed light duty work in the warehouse. He signed off on raises and evaluations of employees and he interviewed and recommended applicants for hire. In two instances, Custer recommended termination and those recommendations were subsequently approved. He also apparently approved time off and overtime and adjusted timecards if they were incomplete. In many cases, his authority was restricted because Vice President Andrea Howard had to approve his actions. According to Custer, she had the "last say" in most, if not all, personnel matters. In other cases, however, Custer acted alone or acted in such a way that Howard routinely approved what he did.

There is no doubt that Custer had the authority to effectively recommend personnel actions with respect to raises, hiring, discipline, and overtime and he responsibly directed employees in at least some respects. There is some question as to whether he had independent judgment to effectuate those personnel actions. On balance, however, I believe that the evidence fairly reflects the view that Custer used independent judgment to effectively recommend raises, hiring, discipline and overtime and to responsibly direct employees. It is, of course, clear that Section 2(11) is phrased in the disjunctive and, if any one of the enumerated factors, including effective recommendations thereof, is performed using independent judgment, supervisory status attaches. In these circumstances, I find that Custer was a supervisor within the meaning of Section 2(11) of the Act.

Supervisory status is sometimes difficult to determine and, as here, often requires litigation before it is resolved. Because both Stearns and Custer honestly believed that Custer was an employee and not a supervisor, Custer was permitted to sign a union authorization card and attend union meetings. He attended two union meetings before his discharge on April 20, about 6 weeks before the Board-conducted election. The question then becomes whether Custer's prounion activities tainted the Union's card majority or the results of the June 1, 1995 election.

No language in any Board or court decision has ever more aptly described the applicable principles in this area than that of Administrative Law Judge Arthur Leff, which was adopted by the Board:

> The Board has never held that any participation by a supervisor in a union organizing campaign, regardless of how marginal his supervisory status or how slight his participation in the campaign may be, is sufficient per se to invalidate the authorization cards of all employees having knowledge of his interest in the union. Board precedents reflect that the Board will not invalidate designation cards for supervisory taint unless it is affirmatively established as a minimum, either that the participation of the supervisory personnel in the organizational campaign was of such a kind as to have implied to the employees signing the cards that their employer favored the union, or that there is a reasonable basis for believing that the employees whose cards are sought to be invalidated were coercively induced to designate the Union through fear of supervisory retaliation.

Orlando Paper Co., 197 NLRB 380, 387 (1972), enfd. 480 F.2d 1200, 1202 (5th Cir. 1973). Applying those principles here, I do not believe a finding of supervisory taint is justified on the record here.

Despite an exhaustive effort by Respondent to uncover evidence that Custer's prounion activity tainted the Union's majority or the election itself, there is little specific evidence of anything more than limited prounion activity on the part of Custer. He spoke up occasionally at union meetings, but the most specific thing any of the witnesses could recall him saying was that the employees would have a tough time getting a union in because President Carabott once told Custer that he would close the operation before recognizing a union. Nor was there any evidence that Custer passed out or collected authorization cards. Nagle did all of that and, despite Respondent's strained attempt to show that Custer first contacted Stearns about unionization, the clear testimony of both Nagle and Stearns, which I credit, shows that it was Nagle who made the first contact. There was no evidence that Custer campaigned on behalf of the Union on worktime between the April 6 meeting and his last day of work on April 20 and most of his comments about the Union were general in nature. Nor was there anything about his attendance at union meetings after his discharge that was specific or remarkable, except for his expressions of support for the Union. There is, moreover, no evidence at all that he used promises or coercion to force his prounion views on other employees and no testimony from employees from which it could be inferred that they believed they were subjected to Custer's supervisory authority for the purpose of forcing them to support the Union. Most of the authorization cards were

signed at the first union meeting as a result of Stearns' solicitations and the others were obtained through the efforts of Nagle. Finally, there was no doubt where Respondent stood on union representation. Respondent was opposed to it and engaged in coercion and discrimination to prevent it. Indeed, Custer had warned employees of Carabott's opposition in dramatic terms. In these circumstances, I cannot conclude that Custer's prounion views were such that there was a reasonable possibility that employees were or would have been coerced by him to support the Union.[13]

Significantly, Custer was discharged early in the union campaign. Although he continued to attend union meetings and to speak in favor of the Union, he had no workplace authority that could reasonably have caused employees to fear that he would use it to coerce adherence to the Union. Respondent argues that a charge was filed alleging that his discharge was unlawful, but that charge, which was based on the contention that Custer was an employee, was dismissed by the General Counsel on the ground that he was a supervisor. Even assuming that employees knew about the charge, which was filed on May 22, they could not possibly believe that Custer would be reinstated or that he would retaliate, on his return, against employees for rejecting the Union when, in fact, Respondent was retaliating, during the campaign itself, against employees for supporting the Union.

The closest case that Respondent could cite for its proposition that this is exactly what the employees believed is *NLRB v. Howard Johnson Motor Lodge*, 705 F.2d 932 (7th Cir. 1983). That case is, however, clearly distinguishable. Although the court ordered a hearing on the employer's objection, after the required hearing, the Board found that the supervisor's limited prounion activity was not such that employees would have felt coerced. *Howard Johnson Motor Lodge,* 272 NLRB 303 (1984). It is true that in that case, like this one, the supervisor was fired before the date of the election. But, in that case, unlike here, the charge was found to have merit and the General Counsel actually issued a complaint alleging that the supervisor was unlawfully fired for refusing to commit unfair labor practices on behalf of her employer. The Board found a violation and a court of appeals enforced the Board's decision on review, and the supervisor was ordered reinstated. There was thus more reason to believe in that case that the prounion supervisor would return and possibly cause employees to believe that her prounion proclivities might coerce them. No such realistic possibility existed in this case because the entire theory of the Union's charge on Custer's behalf was that he was an employee, not a supervisor, and that charge was dismissed by the General Counsel.[14]

In sum, I find that Custer's limited prounion activities did not taint the election or the Union's card majority. He neither led the union effort nor passed out or retrieved authorization cards. He did not say or do anything in connection with his supervisory authority that reasonably could be viewed as coercive or holding out rewards for employees to support the Union. Finally, in view of the clear opposition to the Union by Respondent and Custer's own discharge early in the union campaign, the employees could not possibly believe that Custer would be reinstated or that they had anything to fear by offending Custer and opposing the Union. Indeed, they had everything to fear that Respondent would retaliate against them for supporting it, as the evidence clearly shows. Accordingly, I shall overrule Respondent's objection to the election. See, in addition to *Orlando Paper*, supra; *Fall River Savings Bank v. NLRB,* 649 F.2d 50, 56–57 (1st Cir. 1981); and *Ribbon Sumyoo Corp.,* 308 NLRB 956 (1992).

3. The Union's objections

Because the Union's objections track the serious preelection unfair labor practices committed by Respondent, which were discussed above, I shall sustain the Union's objections to the election. If the Union is found to have lost the election, the election results may not stand because Respondent unlawfully interfered with employee free choice.

E. The Bargaining Order Remedy

The General Counsel contends that the unfair labor practices in this case were so serious an impediment to free choice that they should be remedied by a bargaining order based on the Union's card majority in early April. That remedy is authorized by *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).[15]

In *Gissel,* the Supreme Court approved the issuance of a bargaining order based on a union having secured majority status through authorization cards. That remedy is appropriate where

[13] There is less than meets the eye in the evidence Respondent cites in its brief to support its position. For example, Respondent states that employee Roy contacted Custer at home to ask him about the Union (Br. 23); actually, Roy testified he called Custer "once" and Custer told him "I needed to do what I needed to do." (Tr. 307.) Respondent also refers to a gathering of drivers at a local café before the first union meeting where employee Elliott said that Custer was the first person who told him about the Union (Br. 24); actually, Elliott testified that no cards were solicited or signed at this gathering and he could not recall whether it was Nagle or Custer who first told him about the Union (Tr. 882–883). Respondent also states that employee Christen was questioned by Custer as to how he felt about the Union (Br. 26); actually, Christen testified that in their conversation, which was not on worktime, Custer asked "general questions" about whether he wanted the Union and did not "urge" Christen to join (Tr. 232). None of this or any other testimony cited by Respondent shows that Custer's union activity was extensive or that he used his supervisory authority to force employees to support the Union. In the absence of such evidence, Respondent attempts to show that Custer's "temperament" and his status as a former Marine somehow created fear in the minds of the union supporters that he would use his supervisory authority against them if they did not support the Union (Br. 29). The very need for Respondent to make such a strained argument demonstrates the lack of any real evidence on the point.

[14] The other cases cited by Respondent are likewise distinguishable. In none of them was the evidence of union activity so limited as that of the one supervisor involved here and the evidence to support a reasonable fear by employees that a supervisor would retaliate against them for rejecting the Union so lacking as that in this case. Indeed, some of the cited cases support the findings here that Custer's supervisory authority was not viewed by employees as coercing union support.

[15] One might view the request for a bargaining order remedy under *Gissel* conditional since the Union could be certified as having won the election. It appears, however, that the date the bargaining obligation attached might have some significance in this case. One of the unilateral changes—the discontinuance of the performance reviews and pay raises–appears to have taken place before the election. While the bargaining obligation under a certification arises after the date of the election (*Celotex Corp*., 259 NLRB 1186, 1193 (1982)), under *Gissel,* that obligation attaches as of the date the employer starts an unlawful campaign to influence an election after the union attains a majority (*Crown Cork & Seal*, 308 NLRB 445 (1992)). In any case, if the union is found to have lost the election, the unilateral changes can be found unlawful only if a bargaining order attaches under *Gissel.* I therefore shall consider the *Gissel* request an unconditional one.

an employer's unfair labor practices are so outrageous and pervasive that they could not be cured by traditional remedies and a fair election was therefore impossible, or where the unfair labor practices are less serious but "the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." 395 U.S. at 614.

There is apparently no dispute over the appropriateness of the unit in which the election was held. As of April 20, the date of the first unfair labor practice here (the discrimination involving Roy and McDermott), that unit included 10 employees (the election total of 15, less McDermott, Custer, Holsopple, Stephen Howard, and Brockman). Of those 10 employees, 8 had signed valid authorization cards.[16] The Union's majority is thus established.[17]

I find that a *Gissel* bargaining order is appropriate in this case. Respondent's unfair labor practices were committed by the top two officials of the Respondent, touched all the employees in a relatively small unit, and, since they involved discriminatory terminations and threats of reprisal, are the types of hallmark violations that cannot easily be cured and require a bargaining order. Particularly destructive was Respondent's unlawful unit packing scheme that showed its contempt for free elections. Indeed, the unfair labor practices continued well after the election. Respondent fired the top union adherent in the midst of the hearing in this case in violation of Section 8(a)(3), (4), and (1) of the Act. In these circumstances, I find that, because of Respondent's unfair labor practices, the chances of a fair second election after use of traditional remedies would be slight, and, on balance, employee sentiment as expressed in the signed authorization cards by a majority of the employees would be best protected by a bargaining order. See *Sumo Airlines*, 317 NLRB, 383, 393 (1995); and *International Door, Inc.,* 303 NLRB 582 (1991).

F. The Alleged Unilateral Changes

The General Counsel alleges that, after the establishment of its bargaining obligation, either under *Gissel* or as a result of the election, Respondent made three unilateral changes that adversely affected unit working conditions without notice to or bargaining with the Union. There is no dispute that the requisite notice was not given. Accordingly, if the unilateral changes dealt with or materially affected unit wages, hours, or terms and conditions of employment, they were unlawful, unless justified by compelling economic circumstances. See *Celotex Corp.,* 259 NLRB 1186, 1193 (1982); *Angelica Healthcare Services,* 284 NLRB 844 (1987).

1. Change in the Respondent's annual performance review and pay raise policy

The Respondent had a longstanding practice of giving employees performance reviews. The employees received a review after their first 90 days. Thereafter, the employees receive the reviews annually, around their employment anniversary dates. Usually, employees received a pay raise at the time of the reviews. On April 19, 1995, field service technician David Brimmer received his performance review and a pay raise. Two days before, Respondent had received a copy of the Union's election petition.

After April 19, 1995, no field service technicians received evaluations or pay raises for the rest of the year. In July 1995, Vice President Howard told employee William Elliot that there was a freeze in evaluations. In August 1995, when employee Leonard Christen asked Howard about evaluations, he was told that due to the advice of legal counsel, there would be no reviews given at that time. In January 1996, employee William Elliot received an evaluation but no pay raise. Other employees failed to receive either evaluations or pay raises in 1996, although some did, but not on their anniversary dates.

The evidence clearly shows that Respondent suspended its annual performance review and pay raise policy after the onset of the Union and only sporadically revived it in early 1996. It is clear that the Respondent has changed its policy and that it did so without notice to and bargaining with the Union which had won bargaining rights under *Gissel* on April 20 at the earliest. I reject Respondent's feeble contention that the evaluations and pay raises were merely delayed by Vice President Howard's workload. This is hardly a compelling economic circumstance. Accordingly, I find that the suspension of the performance review and pay raise policy violated Section 8(a)(5) and (1) of the Act.

I also find that Respondent's suspension of the policy violated Section 8(a)(3) and (1) of the Act. Respondent's union animus is well documented and the timing of the suspension makes it clear that Respondent suspended its policy for discriminatory reasons. Respondent offers no legitimate rebuttal of the General Counsel's case on discriminatory motive and makes no mention of the 8(a)(3) aspect of the allegation in its brief. Accordingly, the violation is well established under the *Wright Line* analysis set forth above.

2. Change in Respondent's smoking policy

Respondent's smoking policy is set forth in its employee handbook. The published policy prohibits smoking in various places, including Respondent's vehicles and within 30 feet of any oxygen storage area. The policy permitted smoking in designated smoking areas. Respondent also had a past practice of allowing smoking inside its Leominster warehouse, near the drivers' desk.

On October 17, 1995, Vice President Howard met with the drivers and informed them that the Respondent was now prohibiting smoking inside the building, but allowing it on the loading dock. Howard conducted another drivers' meeting in the Leominster facility on November 10, 1995. At this meeting Howard announced yet another change in the smoking policy:

> Smoking is no longer permitted on loading dock or ramp area. After punching in, load truck and leave for your route. Smoking on my time [is] prohibited at [the] beginning and end of day.

Howard also limited smoking breaks to two 15-minute periods. On November 21, 1995, Howard gave employee Leonard Christen a warning, which stated that Christen had been observed by President Cabot Carabott smoking by the bulk tank. The warning further states: "Policy is no smoking by bulk tank and on company time." (GC Exh. 19.)

[16] McAneany's resignation was effective April 21, but even if he is not counted, the Union's majority was 7 out of 9.

[17] Contrary to Respondent's contention, there is no evidentiary basis to reject the authorization cards because their clearly worded representational purpose was contradicted by statements that the cards would also be used to ask for an election. See *Gissel,* supra, 395 U.S. at 606–610.

I find that Respondent changed its smoking policy in the fall of 1995, after it had a bargaining obligation with the Union. It did so without notifying and bargaining with the Union. This was violative of Section 8(a)(5) and (1) of the Act.[18]

3. Alleged transfer of unit work

In May and September 1995, Respondent hired two new drivers for its Providence, Rhode Island facility because its business in Rhode Island had increased as a result of new contracts with two health providers. Respondent had tried unsuccessfully to get its Leominster drivers to transfer to Rhode Island earlier in the year. In July 1995, Respondent also hired Greg Bash as a driver at its Stoughton, Massachusett's facility as a result of Respondent's purchase of another company that increased its business in that area. Bash was discharged before the hearing in this case and was not replaced. Leominster drivers are presently handling Stoughton work.

Respondent submitted documentary evidence that allegedly shows that the Leominster drivers did not lose jobs, hours, or overtime because of the increase in business in Providence and Stoughton. I have studied that evidence. It shows that, although from April through December 1995 the number of drivers in the unit and their hours fluctuated somewhat, there was no appreciable diminution in jobs, hours, or overtime. The General Counsel has not refuted this evidence. The General Counsel contends that Leominster drivers previously did some of the work in Stoughton and Rhode Island before the new drivers were hired and that Respondent saved money by basing drivers in those locations rather than using Leominster drivers. But the operative question is whether unit work was affected and I find that, if it was affected, it was only marginally affected. In these circumstances, I find that the General Counsel has not shown by a preponderance of the evidence that Respondent's failure to notify the Union or bargain over the hiring of new drivers at its other facilities in response to increased business at those locations was violative of the Act. I shall therefore dismiss this allegation in the complaint.[19]

CONCLUSIONS OF LAW

1. By threatening discharge, loss of jobs, closing of operations, and other reprisals if employees supported a union, by questioning employees about their union activities, by soliciting grievances from employees and implicitly promising to resolve them without a union and by telling employees it was futile to support a union, Respondent has violated Section 8(a)(1) of the Act.

2. By discriminatorily transferring employee McDermott into the election unit, removing employee Roy from light duty work and thereafter discharging him, and by laying off employee Kirouac, in order to discourage union activities and affect the make-up of the election unit, Respondent violated Section 8(a)(3) and (1) of the Act.

3. By discriminatorily discharging employee Nagle because of his union activities and his cooperation with, and testimony before, the Board, Respondent violated Section 8(a)(4), (3), and (1) of the Act.

4. A majority of the Respondent's employees in the following appropriate unit selected the Union to represent them:

> All regular full-time and part-time field service equipment technicians (drivers), equipment repairmen warehousemen, delivery men and dispatchers, employed by Respondent at its Leominster, Massachusetts facility, but excluding all other employees, office clerical employees professional employees, managerial employees, confidential employees, guards, and supervisors as defined in the Act.

5. Respondent's objection to the election of June 1, 1995, is overruled and the Regional Director is directed to retally the ballots, counting those of employees Roy, Kirouac, and LeBlanc and not counting those of employees McDermott, Custer, Brockman, Howard, and Holsopple. The Regional Director is then to issue a certification of representative if the Union receives a majority of the valid votes counted.

6. By committing the violations, set forth in Conclusions of Law 1 and 2 above, Respondent has interfered with the election of June 1, 1995, thus requiring the election to be set aside if the Union does not win the election and secure a certification.

7. By committing the violations set forth in conclusions 1 and 2 above, Respondent rendered unlikely the possibility of holding a fair election after the use of traditional remedies, and, on balance, employee sentiment as expressed in signed authorization cards would be better protected by a bargaining order.

8. By unilaterally changing its smoking policy and its annual performance review and pay raise policy, Respondent violated Section 8(a)(5) and (1) of the Act.

9. The above violations are unfair labor practices within the meaning of the Act.

THE REMEDY

In addition to recommending the customary cease-and-desist order, notice posting requirements, and certain affirmative action, including a bargaining order, I will recommend that Respondent offer full and immediate reinstatement to employees Roy, Kirouac, and Nagle to their former jobs or, if those jobs no longer exist, to substantially equivalent employment. Employee McDermott is to be transferred to his former or a substantially equivalent position. Employees who suffered losses from the unlawful action of Respondent should also be made whole for their losses. The backpay is to be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[20]

[Recommended Order omitted from publication.]

[18] Respondent's defense to this allegation was that smoking next to an oxygen tank was dangerous, but the change in the no-smoking policy was broader than that and the gravamen of the violation is that Respondent failed to notify and bargain with the Union over the change.

[19] The General Counsel cites no cases or legal theory in support of the unilateral change allegation discussed above. In my view, the allegation must be dismissed whether the theory is that the increase in work at other facilities "vitally affects" unit work (*Torrington Co*., 305 NLRB 938 (1991)), or that there was a diversion of work that had a "material, substantial and significant effect" on unit wages, hours, terms and working conditions (*Mitchellace, Inc*., 321 NLRB 191, 193 (1996); *Louisiana-Pacific Corp*., 312 NLRB 165, 166 (1993)).

[20] Because of the severity of the unfair labor practices here, I shall recommend a broad order within the meaning of *Hickmott Foods*, 242 NLRB 1357 (1979). See *Maxi-Mart*, 246 NLRB 1151 fn. 4 (1979).